

Notice of Decision and Reasons for Decision

Applicant:	'AU4'
Agency:	Mallee Track Health and Community Service
Decision date:	3 December 2019
Exemption considered:	Section 32(1)
Citation:	<i>'AU4' and Mallee Track Health and Community Service (Freedom of Information) [2019] VICmr 185 (3 December 2019)</i>

FREEDOM OF INFORMATION – investigation report – allegation of misconduct by agency staff member – complainant seeks copy of investigation report – allegations not substantiated – report requested by agency's legal advisers

Notice of Decision

I have conducted a review under s 49F of the Agency's decision to refuse access to a document in accordance with the Applicant's FOI request.

My decision on the Applicant's request is the same as the Agency.

I am satisfied the document is exempt under section 32(1).

As I have determined it is not practicable to provide the Applicant with an edited copy of the document in accordance with section 25, I have decided to exempt the document in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

3 December 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following document:

The report written by [named person] from [named third party] in response to [the applicant's] resignation letter dated [date/date].
2. In its decision, the Agency identified one document comprising 34 pages, falling within the terms of the Applicant's request. It refused access to the document in full.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined a copy of the document subject to review.
5. The Applicant and the Agency were invited to make a written submission under s 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's review application; and
 - (c) the Agency's submission dated 30 October 2019.
7. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

Review of exemptions

8. In its fresh decision, the Agency relied on the exemptions in sections 30(1), 32(1) and 33(1) to refuse access to the document in full. The Agency's decision letter sets out the reasons for its decision.
9. The document subject to review is an investigation report prepared by an external consultant for the Agency's external legal representative. The report concerns allegations made by the Applicant in relation to an Agency staff member.
10. The report sets out the process undertaken, evidence gathered and findings made in relation to the allegations.

Section 32(1) – document subject to legal professional privilege

11. The Agency relies on section 32(1) to exempt the investigation report and submits the report was commissioned by its legal representative for the dominant purpose of their legal representative providing legal advice to the Agency in response to the allegations made by the Applicant.

12. Section 32(1) provides a document will be exempt if it is of such a nature it would be privileged from production in legal proceedings on grounds of legal professional privilege or client legal privilege.
13. A document will be subject to legal privilege and exempt under section 32(1) where it contains a confidential communication:
 - (a) between the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation;
 - (b) between the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
 - (c) between the client (or the client's agent) and third parties that was made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation.¹
14. Legal professional privilege exists to protect the confidentiality of communications between a client and their legal representative.
15. The High Court of Australia has held the purpose of legal professional privilege, or client legal privilege, ensures a client can openly and candidly discuss legal matters with their legal representative and seek legal advice:

The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.²
16. In determining if legal professional privilege applies, I must consider the dominant purpose for which the confidential communication was made.³ Therefore, whether a document is privileged will depend upon the purpose for which it was brought into existence and is a question of fact.
17. In instances where a legal representative commissions a report on behalf of their client, the relevant intention will be that of the legal representative, which will generally be for the purpose of providing legal advice to their client.
18. The High Court of Australia described this legal principle as:

... a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.⁴
19. 'Dominant' in the context of determining whether the dominant purpose for which a document was created, requires there must be a 'clear and paramountcy' of purpose for privilege to attach.⁵

¹ *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also *Evidence Act 2008* (Vic) s 119.

² *Grant v Downs* (1976) 135 CLR 674, 685.

³ *Esso Australia Resources Limited v Commissioner of Taxation* [1999] HCA 67; 201 CLR 49.

⁴ *Grant v Downs* (1976) 135 CLR 674, 677.

⁵ See *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332; *Commissioner of Taxation v Pratt Holdings* [2005] FCA 1247.

20. On the information before me, I am satisfied the requisite lawyer/client relationship exists between the Agency and their legal representative, which commissioned the report on the Agency's behalf.
21. Further, I am satisfied the dominant purpose for which the investigation report was prepared was in order for the Agency's legal representative to provide the Agency with legal advice in relation to the allegations made by the Applicant
22. Having examined the investigation report and considered the dominant purpose for which it was created, I am satisfied the document is subject to legal professional privilege.

Waiver of legal professional privilege

23. Privilege may be waived (or lost) in circumstances where a client's conduct is inconsistent with the maintenance of legal professional privilege. For instance, where the substance of the privileged advice is disclosed with the client's express or implied consent.⁶
24. An implied waiver of privilege will occur when a positive act of a party is inconsistent with maintaining the confidentiality in the communication irrespective of whether waiver of privilege was the subjective intention of the party.
25. On the information before me, there is no evidence to suggest privilege in the document has been waived by the Agency.

Deletion of exempt or irrelevant information

26. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
27. The Applicant agreed to receive an edited copy of the document subject to review.
28. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁷ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable' and partial release of the document is not required under section 25.⁸
29. I have considered the effect of deleting exempt information from the document to provide the Applicant with an edited copy. In my view, it is not practicable to provide the Applicant with an edited copy of the document in accordance with section 25, as to do so would render the document meaningless.

Conclusion

30. On the information before me, I am satisfied the document is subject to legal professional privilege and is exempt under section 32(1).
31. As I have determined it is not practicable to provide the Applicant with an edited copy of the document in accordance with section 25, I have decided to exempt the document in full.

⁶ Section 122(2) and (3) of the *Evidence Act 2008* (Vic) (for CLP) or *Mann v Carnell* (1999) 201 CLR 1 at [28] (for LPP).

⁷ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

⁸ *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

Review rights

32. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.⁹
33. The Applicant may apply to VCAT for a review up to 60 days from the date [they are] given this Notice of Decision.¹⁰
34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
35. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
36. The Agency is required to notify the Information Commissioner as soon as practicable if either party applies to VCAT for a review of my decision.¹²

When this decision takes effect

37. My decision does not take effect until the relevant review period (stated above) expires, or if either party applies to VCAT for a review, until the VCAT proceeding is concluded.

⁹ The Applicant in s 50(1)(b) and the Agency in s 50(3D).

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and (3FA).